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No. 92-200

In the Supreme Court of the United States

OCTOBER TERM, 1992

WAYNE HUNTSMAN AND RALPH HUNTSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the United States lacks statutory authority in a criminal case to appeal an order granting a motion for a judgment of acquittal following a jury verdict of guilty, and that the court of appeals erred in reversing the district court's order in this case.

1. On December 13, 1988, petitioners, the operators of a farming enterprise called Huntsman Farms, Inc., were indicted by a grand jury sitting in the Eastern District of Arkansas. They were charged with six substantive counts of causing tenants of Huntsman Farms to make false statements for the purpose of influencing the Commodity Credit Corporation to pay federal farm subsidies, in violation of 15 U.S.C. 714m(a); and with conspiracy to commit the false statement offenses, in viola-

tion of 15 U.S.C. 714m(d). Pet. App. D1-D7. Following a jury trial, petitioners were convicted of the six substantive counts but acquitted on the conspiracy count.

On June 10, 1991, the district court granted a postverdict judgment of acquittal on the substantive counts on the ground that the evidence was insufficient. The court also held that there was a fatal variance between the charges and the proof. Pet. App. C1-C19. The district court concluded that while the indictment charged that the tenants had made false statements misrepresenting their status as "producers" in order to qualify for farm subsidies, the proof at trial focused on whether the four tenants qualified for subsidies as "separate persons." The district court found the evidence insufficient because, under the lease agreements with Huntsman Farms, the tenants were contractually bound to share the risks and entitled to share the proceeds from farming operations on the leased land.

The government appealed, and the court of appeals reversed. Pet. App. A1-A18. The court found that the indictment gave petitioners notice that the prosecution would try to prove that their tenants misrepresented their status as producers, and that there was no fatal variance between the indictment and the proof. The court of appeals also found the evidence sufficient, concluding that the tenants' statements were false because none of the tenants qualified as producers who were entitled to share in the crops, either because they did not farm the leased land or because they did not share in the risks and benefits of farming the land.

2. Petitioners contend (Pet. 9-14) that the government has no statutory authority to appeal from a postverdict judgment of acquittal. The Court rejected that argument in *United States* v. *Wilson*, 420 U.S. 332, 337 (1975), where the Court held that 18 U.S.C. 3731 gives the government the right to appeal a post-trial order

overturning a jury's verdict. See also *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 567 n.4 (1977); *United States* v. *Scott*, 437 U.S. 82, 91 n.7 (1978). Every court of appeals that has addressed the issue has followed this Court's decision in *Wilson* and held that the government may take an appeal from a post-verdict order of dismissal or judgment of acquittal.[1] There is therefore no reason for the Court to reconsider this settled question.

3. On the merits, petitioners contend (Pet. 15-23) that they were convicted of different offenses than those charged in the indictment or described in the bill of particulars and that the acts they were alleged to have committed did not fall within the reach of the statute under which they were charged. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioners in the same position they would have occupied if the district court had denied their post-trial motion for judgment of acquittal and dismissal of the indictment. If, upon review of the final judgment, the court of appeals reverses petitioners' convictions, petitioners' present claims will be mooted. If, on the other hand, the court of appeals affirms their convictions, petitioners will then be able to present their current contentions to this Court, together with any other claims they may have, in a peti-

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[1] See, *e.g.*, *United States* v. *Singleton*, 702 F.2d 1159, 1161-1162 (D.C. Cir. 1983); *United States* v. *De Garces*, 518 F.2d 1156, 1159 (2d Cir. 1975); *United States* v. *Dixon*, 658 F.2d 181, 187 (3d Cir. 1981); *United States* v. *Steed*, 674 F.2d 284, 285 (4th Cir.), cert. denied, 459 U.S. 829 (1982); *United States* v. *Cardenas*, 748 F.2d 1015, 1023 (5th Cir. 1984); *United States* v. *Klein*, 910 F.2d 1533, 1535 (7th Cir. 1990); *United States* v. *Sharif*, 817 F.2d 1375, 1376 (9th Cir. 1987); *United States* v. *Quarry*, 576 F.2d 830, 832-833 (10th Cir. 1978); *United States* v. *Greer*, 850 F.2d 1447, 1449 (11th Cir. 1988).

tion for a writ of certiorari seeking review of the final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

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[2] Because this case is interlocutory, we are not responding to petitioners' challenge to the court of appeals' ruling on the merits. We will file a response on those issues if the Court requests.